

Expert witness survey 2009

Respondent rate boosted by MoJ attack on fees

There was a great response to the questionnaire enclosed with our September 2009 issue of *Your Witness*. By the end of October, 511 forms had been submitted, accounting for some 20% of the readership. A big 'thank you' to all who took the trouble to complete them. Their data have contributed to the eighth survey of its kind in 14 years.

The survey's timing could not have been better because it coincided with the Ministry of Justice (MoJ) publishing proposals to cap expert witness fees (see pages 4–6) in publicly funded cases. The data we have gathered through these biannual surveys have enabled us to demonstrate not only that fee inflation over the past decade has been modest, but also that the level of the caps being proposed would equate to a halving of the current fees for many expert witnesses. It may take a bit of time to contribute to these surveys, but I hope you will agree the value we gain through the exercise is well worth it.

The experts

Of the 511 experts who returned questionnaires by the end of October, 226 were medical practitioners. Of the remaining 285 experts, 65 were engineers, 49 were in professions ancillary to medicine, 28 were accountants or bankers, 32 had scientific, veterinary or agricultural qualifications, 19 were surveyors or valuers and 31 were architects or building experts. The substantial 'others' category totalled 61.

Work status and workload

Of the respondents, 265 (52% of the total) work full time and 192 (38%) work part time. Only 9% describe themselves as retired. These figures have now been fairly stable since 2003.

Overall, expert witness work accounts, on average, for 46% of their workload, a figure essentially unchanged since 2001. Clearly, these individuals are much involved in expert witness work but have an even more extensive commitment to their professions – which is, of course, exactly as it should be.

Experience and outlook

We also asked respondents to say for how long they had been doing expert witness work. From their answers it is apparent that they are a very experienced lot indeed. Of those who replied, 95.7% had been practising as expert witnesses for at least 5 years, and 83.5% had been undertaking this sort of work for more than 10 years. Just half of the respondents (51%) saw expert witness

	2001	2003	2005	2007	2009
Full reports	41	45	54	54	57
Advisory reports	12	11	13	17	19
SJE instructions	12	14	15	14	15

Table 1. Average number of full, advisory and SJE reports per expert over time.

work as an expanding part of their workload, similar to the view expressed since 2003.

Their work

Reports

In all eight of our surveys we have asked those taking part to estimate the number of expert reports they have written during the preceding 12 months. The averages for the last five surveys are given in Table 1.

Single joint experts

Statistics relating to the use of single joint experts (SJE) have levelled off since their dramatic rise between 1999 and 2001 (a jump from 3 to 12 instructions a year) brought on by the Woolf reforms. Now, 66% of experts have been instructed as SJE, and on average each expert receives 15 such instructions in the year. It is possible that this levelling off in the use of SJE is why the Civil Procedure Rules Committee has introduced specific guidance into CPR Part 35 on when an SJE appointment would be appropriate.

Court appearances

Another change over the years that many experts will find more welcome is the reduction in the number of cases for which they are required to give their evidence in court. It is now altogether exceptional for experts to have to appear in court in 'fast track' cases, and it is becoming less and less likely in those on the 'multi-track'. In 1997 we recorded that the average frequency of court appearances was 5 times a year; some 4 years later this had dropped to 3.8; it now stands at 2.9.

Variation by specialism

These averages, however, hide a lot of variation by specialism (see Table 2). For example, the reporting rate for medics is much greater than in all other specialisms. Furthermore, SJE appointments are much more common in medical cases than in the other specialisms.

Professional group (n = number of respondents)	Reports	Court appearances	Advisory reports	SJE instructions
Medicine (n = 226)	92.5	2.5	29.1	23.5
Paramedicine (n = 49)	62.3	3.6	11.3	16.5
Engineering (n = 65)	20.1	2.6	6.8	3.0
Accountancy (n = 28)	7.4	0.9	9.4	2.1
Science (n = 32)	24.9	5.1	23.6	2.8
Surveying (n = 19)	23.2	1.0	14.1	11.5
Building (n = 31)	14.0	0.7	9.0	2.9
Others (n = 61)	30.9	5.6	13.5	12.0
Aggregate averages	56.8	2.9	19.3	14.6

Table 2. Average number of reports, court appearances, advisory reports and SJE instructions by specialism.

Report rate grows steadily as SJE rate levels off

Numbers of court appearances are similar in all areas except the sciences, where the use of forensic science in the criminal caseload pushes up the average.

Their fees

Which brings us to the detail everyone wants to know. How much are fellow experts charging for their expert witness services? This information is summarised in Table 3.

For each professional group the table gives average hourly rates for writing reports and full-day rates for attendance in court, with the 2007 data for ease of comparison.

Given the small size of some of the groups, it would be unwise to read too much into the changes revealed by these pairs of figures.

It was this part of the data set that allowed us to provide a time series on expert witness fees to the MoJ showing that, of the 59% increase in fee rates since 1999, 35% was accounted for by compound inflation. Furthermore, we could show that medical doctors, for example, had only increased their fees by 9% in real terms over the decade.

Cancellation fees

The issue of fees that become due as a result of cancelled trials continues to be a source of friction between expert witnesses and those who instruct them. The average percentage of the normal fee experts charge is generally controlled by the amount of notice they receive of the cancellation. In this survey, the percentages are 6.2% if notice is given at least 28 days before the trial was due, 18.4% if 14 days, 39.5% if 7 days and 78.6% if just 1 day's notice is given.

The right to cancellation fees is one that has to arise from the contract between the expert and the lawyer, although the MoJ has made claiming them very difficult in publicly funded cases from April 2010. This ought to act as yet another spur to all experts to put in place clear, written terms of engagement.

Speed of payment

In this survey, 85% of experts reported that the promptness with which invoices are paid had not deteriorated – but that really means matters couldn't get much worse! One measure of the problems experts have in securing prompt payment is the number of bills settled on time. In this survey, the number of experts reporting their bills were being paid on time *in even half of their cases* is only 40.5% (the same as in 2003 but down by 8 points since 2007). Clearly, the situation remains grim.

Against this background, it is depressing to note that whilst 85% of experts say they stipulate terms, still fewer than 50% use a written form of contract. Without a solid contractual basis, experts are making their credit control much more complex than it need be. The *Civil Procedure*

Professional group (n = number of respondents)	Average rate (£)			
	Writing reports (per hour)		Court appearances (per day)	
	2009	2007	2009	2007
Medicine (n = 226)	192	170	1,252	1,163
Paramedicine (n = 49)	153	118	1,067	827
Engineering (n = 65)	118	112	836	876
Accountancy (n = 28)	192	174	1,246	1,105
Science (n = 32)	114	107	811	720
Surveying (n = 19)	162	142	1,140	938
Building (n = 31)	118	102	860	835
Others (n = 61)	120	121	760	811
Totals	160	143	1,069	991

Table 3. Average charging rates for report writing and court appearances by specialism (2007 and 2009).

Rules Experts Protocol requires (at 7.2) that terms be agreed at the outset. Clearly, the hope we often express – that the imposition of this official obligation would help to persuade more experts to adopt written terms – is falling on deaf ears!

As every lawyer knows, setting out clear terms for any contract, at the outset, is essential if subsequent problems are to be avoided. The contract between expert and instructing lawyer should be no different. As an expert listed in the *UK Register of Expert Witnesses* you have access to *Factsheet 15* dealing specifically with terms of engagement (all factsheets are freely available at www.jspubs.com), and our *Little Book on Expert Witness Fees*¹ makes creating a set of terms even easier. Or why not go to the *Terminator* section of our website where you can create personalised sets of terms of engagement based on the framework set out in our *Little Book on Expert Witness Fees*? So now you have no excuse. Use our free member resources to set down a firm contractual base and better secure your position with your instructing solicitor.

The ultimate solution?

If all else fails, experts can sue for their fees – or at least threaten as much. Obviously this should be the option of last resort, if only because it is likely to lose the expert a client.

Of those who took part in our 1999 survey, 24% claimed to have sued for their fees on at least one occasion. That figure has risen to 29% in this survey. If you are considering suing for your fees, our *Little Book on Expert Witness Fees*¹ has a whole chapter dedicated to getting paid. But it is important to recognise that the basis for any such suit is in contract. If you have not built the instruction upon a firm contractual footing, winning in court may well be more tricky.

Chris Pamplin

Fee data crucial in fending off the MoJ capping proposals

Reference

¹ Pamplin, C.F. [2007] *Expert Witness Fees*. JS Publications ISBN 1-905926-01-4 Order line (01638) 561590